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Freedom of Information Act Requires Disclosure of IRS Letter Rulings

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tion, and cruel and unusual punishment, to name just a few. It can only be suggested that the Court will employ a case-by-case approach similar to that used by the "fundamentalist" justices[61] in applying the Bill of Rights to the states.

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FREEDOM OF INFORMATION ACT REQUIRES DISCLOSURE OF IRS LETTER RULINGS

Tax Analysts & Advocates, a public interest law firm, petitioned the Internal Revenue Service[1] for disclosure of certain letter rulings, technical advice memoranda, and related communications.[2] These had been issued by the Service to producers of certain minerals regarding the Service's determination of which processes were "mining" within the meaning of subsection 613(c) of the Internal Revenue Code.[3] After its petition was denied, and other administrative alternatives exhausted, Tax Analysts & Advocates sued in federal district court to compel disclosure of the rulings under the Freedom of Information Act.[4] The IRS contended that these rulings were not within the scope of the Act, and, alternatively, that they were specifically exempt from disclosure. The district court rejected both of these positions and ordered disclosure of the letter rulings, technical advice memoranda,

61. Mr. Justice Harlan, one of the Court's staunchest fundamentalists, defined fundamentalism by saying that it

> start[s] with the words "liberty" and "due process of law" and attempt[s] to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is . . . the one that was followed throughout the 19th and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles . . . of justice which inhere in the very idea of free government which no member of the Union may disregard."

Duncan v. Louisiana, 391 U.S. 145, 176 (1968). Justice Harlan continued by pointing out that "[t]he logically critical thing . . . was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental." *Id.* at 179.

1. Hereinafter referred to as the IRS or Service.

2. "A [letter] 'ruling' is a written statement issued to a taxpayer . . . which interprets and applies the tax laws to a specific set of facts." 26 C.F.R. § 601.201(a)(2) (1974). It is requested by a taxpayer who desires to know in advance the tax consequences of a proposed action.

A technical advice memorandum is issued by the National Office of the IRS to a District Director who requests advice regarding treatment of a specific set of facts contained in a return filed by a taxpayer. *Id.*, § 601.105(b)(5) (1974).

The communications involved included correspondence to and from the IRS in regard to the rulings sought, memoranda of conferences, telephone calls and index-digest card summaries.

Hereinafter the foregoing will be collectively referred to as rulings except where otherwise indicated.

3. 26 U.S.C. § 613(c) (1970). This subsection deals with the computation of gross income from property for percentage depletion purposes.

4. 5 U.S.C. § 552 (1970).

and other communications.[5] On appeal to the United States Court of Appeals, D.C. Circuit, the IRS did not challenge the district court's finding that the rulings fell within the purview of the Act, but reasserted its exemption argument.[6] The court of appeals *held* modified in part and remanded: Letter rulings are not specifically exempted by statute and, therefore, must be disclosed; however, technical advice memoranda are exempt and need not be disclosed. *Tax Analysts & Advocates v. IRS,* 505 F.2d 350 (D.C. Cir. 1974).

The Freedom of Information Act became law on July 4, 1967.[7] The purpose of the Act was to expand public access to governmental records held by administrative agencies, intending thereby to increase public knowledge and confidence in the governmental decision-making process and to facilitate dealings with administrative agencies.[8]

The Act expressly divides the information required to be made available into three categories: (1) material having general applicability, which must be published in the *Federal Register;*[9] (2) those statements of policy and interpretations adopted by an agency and not published in the *Federal Register,* which must be indexed and made available for public inspection and copying;[10] and (3) identifiable records, which must be made available on request.[11] The Act also provides for nine specific exemptions, or categories of material for which disclosure cannot be compelled.[12] Three of these exemptions were relied on by the IRS in *Tax Analysts.* These were: (1) matters specifically exempted from disclosure by statute; (2) trade secrets and confidential financial information; and (3) inter- or intra-agency memoranda.

In keeping with its remedial purpose, the courts liberally construe the Act in favor of disclosure.[13] Conversely, the provisions for exemption are specific, limited in scope, and should be narrowly construed.[14]

The foregoing would appear to offer a strong case for compelling disclosure of IRS letter rulings and technical advice memoranda.[15]

5. Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973).

6. The IRS apparently also did not challenge, and the court of appeals did not discuss, the lower court's ruling as to the related communications requiring disclosure absent a showing, by in camera production of the documents, that they fell within the exemption for inter-agency memoranda. 5 U.S.C. § 552(b)(5) (1970).

7. 5 U.S.C. § 552 (1970).

8. Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972).

9. 5 U.S.C. § 552(a)(1) (1970).

10. 5 U.S.C. § 552(a)(2) (1970).

11. 5 U.S.C. § 552(a)(3) (1970).

12. 5 U.S.C. § 552(b) (1970).

13. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Fisher v. Renegotiation Board, 473 F.2d 109 (D.C. Cir. 1972).

14. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

15. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.9 (1970 Supp.) [hereinafter cited as DAVIS]; Reid, *Public Access to Internal Revenue Service Rulings,* 41 GEO. WASH. L. REV. 23 (1972) [hereinafter cited as Reid]; Oran, *Public Disclosure of Internal Revenue Service Private Letter Rulings,* 40 U. CHI. L. REV. 832 (1973) [hereinafter cited as Oran].

Public confidence in the equitable administration of the tax system has been weakened by the widely-held view that preferential treatment is afforded to certain taxpayers, particularly those in high-income brackets and those representing special interests.[16] Publication of these rulings, by providing the public with full disclosure of the reasoning behind IRS policy determinations, might help to allay these fears of favoritism. Public confidence in the tax system would thereby be increased, a confidence vitally necessary for the effective functioning of a system largely dependent on the public's trust and voluntary cooperation.

Significantly, certain tax lawyers have always had access to some letter rulings. A common practice is to exchange these among attorneys; letter rulings have even been published in various tax journals.[17] This obvious interest by taxpayers and their attorneys in letter rulings issued to others attests to the usefulness of free access to them. Fairness would seem to dictate that all taxpayers—not merely those who can afford elite representation—should have equal opportunity to obtain these rulings. Furthermore, public disclosure of these documents would encourage closer public scrutiny and criticism of IRS actions, in keeping with the goal of open debate of governmental policy which representative democracy seeks to foster.[18]

The Service, nevertheless, has raised several policy objections to publication of letter rulings.[19] First, these rulings have no precedential value in that only the taxpayer to whom the ruling is issued has a right to rely on it. Second, if these rulings were generally disclosed and relied upon as precedent by the public, extensive review of each ruling would be necessary before its issuance, thus resulting in delay and prolonged uncertainty to the concerned taxpayer.[20] Third, since letter rulings are not to be regarded as precedent, disclosure would not in any useful way add to the public's information regarding IRS policy. Finally, the public is amply made aware of IRS policy through issuance of revenue rulings,[21] the only rulings the Service regards as having precedential value.

These arguments are unpersuasive and are belied by both the practices of the IRS itself and those of tax lawyers. Of the large number of letter rulings issued each year, only a small number are published as revenue rulings,[22] but the IRS itself divides unpublished letter rulings into those which have reference value and those which do not. Those falling into the former group are filed and indexed by the IRS for the use of its agents in deciding future questions.[23] This, in addition to the

16. Reid, *supra* note 15, at 27.
17. *Id.* at 28.
18. *Id.* at 36.
19. *See* Uretz, *The Freedom of Information and the IRS*, 20 ARK. L. REV. 283 (1967).
20. *Id.* at 288.
21. *Id.*
22. Oran, *supra* note 15, at 836.
23. Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973).

actions of tax practitioners in seeking out and circulating past rulings, demonstrates that disclosure of these rulings would be a valuable addition to the public's store of information, notwithstanding the Service's contrary assertions.

The IRS has additionally contended that, in order to preserve the confidentiality of taxpayer returns, identifying details contained in the rulings would have to be deleted prior to publication, resulting in a greatly increased administrative burden and delay. This argument, however, runs counter to both the policy of encouraging public disclosure of governmental action *despite* the oft-claimed increases in "administrative burden," and the practical realization that not all taxpayers would seek confidentiality. The SEC, for instance, discloses all of its no-action letters without deleting identifying details.[24] One who requests such a letter from the SEC may apply for a 90-day period of non-disclosure by demonstrating appropriate need for confidentiality. If the request is denied the party may withdraw his request for a letter.[25] It is suggested that a similar procedure could be implemented by the IRS without undue burden.[26]

In challenging the IRS policy objections to disclosure, Tax Analysts & Advocates invoked that provision of the Act requiring disclosure of policy statements and interpretations adopted by the agency and not published in the *Federal Register* which must be indexed and made available for public inspection and copying.[27] In holding that the letter rulings and technical advice memoranda were "interpretations" within the meaning of that section, and were therefore subject to disclosure, the district court's decision was clearly in accord with the wording and policy of the Act. The IRS had contended that only those rulings which are "precedent"[28] were "interpretations" under the Act. As the district court pointed out, however, the only authority for such a position was a house report on the Act which was "contradictory" to the express terms of the statute.[29] The court cited Professor Davis' treatise where, in discussing the Act, he criticized this position which had been initially set forth in a memorandum by the Attorney General.

> This statement, in my opinion, is not the law, even though the *Attorney General's Memorandum,* without explanation, quotes it with approval. It is contrary to the needs of fairness, contrary to the House Committee's earlier statements,

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24. 17 C.F.R. § 200.81 (1974).

25. *Id.*

26. The IRS has, in fact, recently announced that it will no longer issue private letter rulings unless a taxpayer waives confidentiality. The Wall Street Journal, Oct. 9, 1974, at 1, Col. 5.

27. 5 U.S.C. § 552(a)(2) (1970).

28. 26 C.F.R. § 601.701-2 (1974).

29. 362 F. Supp. 1298 (D.D.C. 1973). For a more complete discussion of this point see DAVIS, *supra* note 15.

> contrary to the report of the Senate Committee, and contrary to the clear words of the statute.[30]

The lower court correctly noted that had it not found these rulings to be interpretations within the meaning of subsection (a)(2) of the Act, they were nevertheless requested, identifiable records within the meaning of subsection (a)(3).[31] But if the rulings were deemed merely "records," it would be necessary to know of a particular ruling's existence in order to provide the identifying details necessary to obtain it. However, by classifying these rulings as interpretations, rather than merely as records, the court made them subject to the indexing requirements of subsection (a)(2).[32] In thus requiring the indexing of the rulings, the court significantly increased their usefulness to taxpayers by guaranteeing the creation of a procedure by which a taxpayer could readily discover the existence of any ruling applicable to his particular fact situation.

On appeal, the district court's classification of the letter rulings and technical advice memoranda as interpretations was not challenged by the IRS. It chose, instead, to contest only the holding that these rulings were not "specifically exempted from disclosure by statute" under subsection (b)(3) of the Act.[33] The IRS argued that these rulings were part of tax returns under Internal Revenue Code sections 6103[34] and 7213[35] providing for confidentiality of returns and thus were exempt from the disclosure requirements of the Freedom of Information Act. However, as Judge Davies pointed out in the court of appeals decision, these Internal Revenue Code sections were intended to protect a taxpayer's privacy as to the financial information required in filing a return.[36] In deciding that a letter ruling is not in fact part of a return, the appellate court stated:

> The fact that taxpayers may elect to follow the Internal

30. DAVIS, *supra* note 15, at 131.

31. 362 F. Supp. 1298 (D.D.C. 1973).

32. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published.

5 U.S.C. § 552(a)(2) (1970).

33. 5 U.S.C. § 552(b)(3) (1970).

34. Returns made with respect to taxes . . . shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

26 U.S.C. § 6103(a)(1) (1970).

35. It shall be unlawful . . . to divulge . . . the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and . . . to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income profit, losses, or expenditures appearing in any income return.

26 U.S.C. § 7213(a)(1) (1970).

36. 505 F.2d at 354; *see also* Kingsley v. Delaware, L. & W.R.R., 20 F.R.D. 156, 158 (S.D.N.Y. 1957).

> Revenue Service's recommendations that letter rulings be attached to returns . . . does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.*[37]

Thus, the confidentiality provisions in the Internal Revenue Code do not exempt letter rulings from disclosure under the Act.

The same, however, is not the case with technical advice memoranda. The court of appeals noted that these "deal directly with information contained in 'returns made with respect to taxes' and are a part of the process by which tax determinations are made . . . ."[38] Therefore, the court reasoned, these memoranda fall within the express provisions of IRC section 6103 and are specifically exempt from disclosure.

By relying on reasoning similar to that used in declaring letter rulings not exempt, the court might well have held that technical advice memoranda must be disclosed. Technical advice memoranda may be considered "interpretations" or "instructions to staff that affect a member of the public" within the meaning of the Act.[39] The same section of the Act also provides that

> [t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may *delete identifying details* when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction.[40]

Although not articulated in the opinion, the element of compulsion seems clearly to be a distinguishing factor between the treatment of letter rulings and a tax return. A taxpayer must, under penalty of law, file a tax return, whereas a request for a letter ruling is a wholly voluntary act on behalf of a taxpayer seeking guidance from the IRS. Furthermore, a similar distinction can be drawn between letter rulings and technical advice memoranda. Again, a taxpayer may seek a letter ruling if he feels such advance advice would be of use to him in his business planning or the preparation of his returns, but he is under no duty or compulsion to do so. If letter rulings are hereafter to be published, a taxpayer to whom confidentiality is of paramount importance may choose to forego the option of requesting one. In contrast, a technical advice memorandum is issued by the national office of the IRS *subsequent* to the compulsory filing of an income tax return, with no action on the part of the taxpayer to whom it pertains. Having been forced to disclose confidential information in his return, it might be argued, the taxpayer should be protected against further invasion of

37. 505 F.2d at 354.
38. *Id.* at 355.
39. 5 U.S.C. § 552(a)(2) (1970).
40. *Id.* (emphasis added).

his financial privacy through the publication of a technical advice memorandum based on his return.

Nevertheless, unwarranted disclosure of personal financial information could be avoided by the simple expedient of a deletion procedure as outlined in the Act.[41] This would, it is suggested, more closely harmonize the confidentiality policy of the Internal Revenue Code with the policy of fullest possible disclosure under the Act.

The IRS additionally asserted as applicable a specific exemption in the Act for confidential financial or commercial information.[42] The trial court held that this exemption applied only to information that is " 'independently confidential' and not susceptible to being rendered anonymous."[43] The IRS was allowed thirty days in which to demonstrate by in camera production of the items sought that these requirements for non-disclosure were met. The court of appeals affirmed this finding emphasizing that this procedure was still available as to all documents other than the technical advice memoranda.

The *Tax Analysts* decision continues the trend of broad construction of the Freedom of Information Act and opens yet another body of private law to public scrutiny. The court of appeals, however, would have better served the purposes of the Act by construing its exemptions more narrowly to require disclosure of technical advice memoranda as well as letter rulings.

Although it was not held that these rulings were precedent to be relied upon by tax lawyers in future cases, it was noted by the district court that past rulings are persuasive as to the interpretation held by the IRS. Thus, while the service is free to change a position taken in a letter ruling, if it later finds the interpretation therein erroneous, arbitrary changes would be open to challenge in court.[44] Past rulings will therefore be valuable evidence for a taxpayer who has relied on an earlier letter ruling.

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41. "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details . . . ." 5 U.S.C. § 552(a)(2) (1970). This was the procedure in Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970), a case also involving confidential financial information.

42. 5 U.S.C. § 552(b)(4) (1970).

43. 362 F. Supp. 1298, 1307 (D.D.C. 1973).

44. *Id.* at 1303.